SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 28 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 825

JOHN O'C. FITZGERALD,

Petitioner,

vs.

THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION; THE HONORABLE EDWIN A. ROBSON, AS JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND ANY JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, TO WHOM THE CASE OF THE UNITED STATES OF AMERICA *vs.* JOHN O'C. FITZ GERALD, NO. 60 CR 188, PENDING IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, MAY BE ASSIGNED FROM TIME TO TIME,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN O'C. FITZGERALD, *pro se,*
Petitioner,
CHARLES F. MARINO,
10 South La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Petition for a Writ of Certiorari	1, 2
Orders Below	3
Jurisdiction	3
Questions Presented	3, 4
Constitutional and Statutory Provisions and Rules Involved	4, 5
Statement of Facts	5-7
Reasons for Granting the Writ	8
I. The Manner in Which the Jury Herein Was Discharged From Giving a Verdict Was in Conflict With the Decisions of This Court	9
A. This Court Has Held That a Jury Should Not Be Discharged From Giving a Verdict Unless the Trial Judge Considers All the Circumstances at the Time of Discharge and Then Determines, in His Sound Discretion, That There Is a Manifest Necessity for Discharging the Jury	9-11
B. This Court Has Held That a Defendant and His Attorney Have a Right to Be Present at Every Stage of the Trial	12
II. The Manner in Which the Jury Herein Was Discharged From Giving a Verdict Was a Clear Departure From the Usual and Accepted Course of Judicial Proceedings	12
III. The Court of Appeals Had Jurisdiction to Entertain the Petition Filed Therein and Its Failure to Do So Is a Clear Abuse of Its Discretion	13-16
Conclusion	16

Appendix:

Exhibit I—The Petition for a Writ of Prohibition or a Writ of Mandamus or Both a Writ of Prohibition and a Writ of Mandamus Filed in the Court of Appeals on February 21, 1962 17-25

Exhibit I A—The Information Filed Against the Petitioner 27, 28

Exhibit I B—The Order Entered December 4, 1961 by the District Court Vacating and Expunging From the Record the Order Entered on June 7, 1961 and Making a Part of the Record the Facts Surrounding the Discharge of the Jury 29-33

Exhibit I C—Petitioner's Motion Filed in the District Court on December 18, 1961 for an Acquittal or Discharge or a Dismissal of the Information With Prejudice 34-39

Exhibit I D—Memorandum and Order Entered by the District Court on January 30, 1962 Denying the Petitioner's Motion for an Acquittal or a Discharge or a Dismissal of the Information With Prejudice 40-45

Exhibit I E—The Order Entered by the District Court on January 30, 1962 Setting the Case for February 20, 1962 to Fix a Date for Trial 46

Exhibit I F—The Order Entered by the District Court on February 7, 1962 Resetting the Case for February 27, 1962 to Fix a Date for Trial 47, 48

Exhibit II—The Order Entered February 27, 1962 by the Court of Appeals Denying the Petition for a Writ of Prohibition or a Writ of Mandamus or Both a Writ of Prohibition and a Writ of Mandamus 49, 50

Exhibit III A— Portion of the United States Constitution, Amendment V 50

Exhibit III B 28 U. S. C. Section 1651(a) 50

Exhibit III C— Rule 19 of the Rules of the United States Court of Appeals for the Seventh Circuit, 28 U. S. C. A., Rules of the United States Courts of Appeals pp. 396-397 51

AUTHORITIES.

Cases.

Chessman v. Teets, 350 U. S. 3 (1955) 16
De Beers Mines v. United States, 325 U. S. 213 (1944) ..... 14, n. 13
Dreyer v. Illinois, 187 U. S. 71 (1902) 10
Fong Foo v. United States, No. 64, October Term, 1961 (Not Reported) 15
Gori v. United States, 367 U. S. 364 (1961) ..... 8, n. 6
Hines v. Ohio, 24 Oh. St. 134 (1873) ..... 12, n. 11
Jackson v. Superior Court, 10 Cal. 2d 350, 74 P. 2d 243 (1937) 16
Kastel v. United States, 23 F. 2d 156 (2nd Cir., 1927) 13
Keerl v. Montana, 213 U. S. 136 (1908) 10
La Buy v. Howes Leather Co., 352 U. S. 249 (1957) ..... 14, n. 14
Logan v. United States, 144 U. S. 263 (1891) 10
McCabe v. Bronx County Court, 199 N. Y. S. 2d 241 (1960) 16
People v. Cage, 48 Cal. 323 (1874) ..... 12, n. 11
Shields v. United States, 273 U. S. 583 (1927) 12
Simons, Ex Parte, 247 U. S. 231 (1917) 14, 15
State v. Beverly Jefferson, 66 N. C. 309 (1872) ..... 12, n. 11
United States v. Ball, 163 U. S. 662 (1895) 14
United States v. Perez, 9 Wheat. (22 U. S.) 579 (1824) 9, 10, 12

Constitutional Provisions.

United States Constitution, Amendment V 4, 5, 7, 14, 15, 16

Statutory Provisions.

28 U. S. C. Sec. 1254(1) 3
28 U. S. C. Sec. 1651(a) 4, 5
26 U. S. C. Sec. 7203 5

Rules.

Rule 19 of the Rules of the United States Court of Appeals for the Seventh Circuit, U. S. C. A. Title 28, United States Court of Appeals Rules, pp. 396, 397 ..... 5, 7, n. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No.

JOHN O'C. FITZGERALD,

Petitioner,

vs.

THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION; THE HONORABLE EDWIN A. ROBSON, AS JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND ANY JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, TO WHOM THE CASE OF THE UNITED STATES OF AMERICA *vs.* JOHN O'C. FITZGERALD, NO. 60 CR 188, PENDING IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, MAY BE ASSIGNED FROM TIME TO TIME,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on February 27, 1962, denying, without hearing, Petitioner's Petition for a Writ of Prohibition, or a Writ of Mandamus,

or both of such Writs, to prohibit the Respondents, the United States District Court, Northern District of Illinois, Eastern Division, and the Honorable Edwin A. Robson, as Judge of said Court, from taking any further steps or proceedings to put the Petitioner on trial a second time in the case of *United States of America* v. *John O'C. FitzGerald*, No. 60 CR 188, or in the alternative, to compel the Respondents to enter an Order acquitting or discharging the Petitioner or dismissing the information against him with prejudice, on the grounds that a second trial would be a denial of the Petitioner's constitutional guaranty against double jeopardy.[1]

1. This is the third time a segment of the case of *United States of America* v. *John O'C. FitzGerald*, 60 CR 188, has been brought to this Court.

In preparing a motion based on double jeopardy shortly after the end of his trial, the Petitioner discovered that a factually erroneous order had been entered by the trial judge, the Honorable Michael L. Igoe, in regard to the manner in which the jury was discharged. Believing that the factually erroneous order would militate against the success of his plea of double jeopardy, the Petitioner twice filed motions before the Honorable Michael L. Igoe to correct the critical order, but each time the motion was summarily denied. After his case had been reassigned to the Honorable Edwin A. Robson, who is a Respondent herein, the Petitioner filed a petition before him to correct the factually erroneous order; that petition was also denied without a hearing.

The Petitioner on August 9, 1961, filed a Petition for a Writ of Mandamus in the Court of Appeals to compel the Judges of the District Court to hold a hearing to ascertain the truth concerning the discharge of the jury in the instant case, and thereupon, to expunge the factually erroneous order from the record and to enter an order in accordance with the truth.

After nearly a month passed without the Court of Appeals taking any action, the Petitioner filed a Motion for Leave to File a Petition for a Writ of Mandamus and a Petition for a Writ of Mandamus in this Court, No. 499, Misc., on September 5, 1961, praying that the Judges of the Court of Appeals be compelled to reach a determination promptly on the Petition for a Writ of Mandamus, or in the alternative, that the Judges of the District Court be compelled to hold a hearing to ascertain the truth concerning the discharge of the jury and to correct the record accordingly. The following day, September 6, 1961, the Court of Appeals summarily denied the Petition for a Writ of Mandamus

ORDERS BELOW.

The Order entered by the United States Court of Appeals for the Seventh Circuit on February 27, 1962, appears in Appendix, Exhibit II, pages 49 and 50. The Memorandum and Order entered by the United States District Court, Northern District of Illinois, Eastern Division, on January 30, 1962 (Appendix, Exhibit I (D), pages 40-45) has not been reported as of this date.

JURISDICTION.

The Order of the United States Court of Appeals for the Seventh Circuit was made and entered on February 27, 1962. Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

Whether the District Court Judge clearly departed from the decisions of this Court and the usual and accepted course of judicial procedure when, in a long and protracted criminal case, he

---

which was filed therein. Thereafter, on October 4, 1961, the Petitioner filed a Petition for a Writ of Certiorari in this Court, No. 472, to review the decision of the Court of Appeals.

Prior to any decision by this Court on the above Motion and Petition, the United States attorney, acting by and under the direction of the Solicitor General of the United States, entered into a stipulation with the Petitioner that the factually erroneous order be vacated and expunged from the record and that an order be entered making the facts pertaining to the discharge of the jury a part of the record in the instant case.

Thereafter, on January 2, 1962, the Solicitor General of the United States filed a Memorandum in response to the above Motion and Petition setting forth the order entered in the District Court pursuant to the stipulation and contending that the issues raised by the above Motion and Petition were thereby rendered moot. Accordingly, on January 15, 1962, this Court denied the above Motion and Petition.

(i) decided at the time the jury began its deliberations that they could deliberate only about five hours;

(ii) instructed the deputy marshal to discharge the jury at a fixed time in the future if they failed to reach a verdict;

(iii) left the courthouse shortly after the jury retired and did not see or communicate with the jury after the jury retired; and,

(iv) was absent when the deputy marshal discharged the jury without a verdict outside the presence of the defendant and his attorney?

Whether the Court of Appeals abused its discretion in summarily denying the Petition which alleged the above facts and prayed for a Writ of Prohibition, or a Writ of Mandamus, or both of such Writs, to prohibit the District Court from trying the Petitioner a second time contrary to the jeopardy provision of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED.

The constitutional and statutory provisions and rules involved in this case, and the pertinent text of which is set forth in the Appendix, are:

CONSTITUTIONAL PROVISIONS.

United States Constitution, Amendment V (Appendix, Exhibit III (A), page 50).

STATUTORY PROVISIONS.

28 U. S. C. Sec. 1651 (a) (Appendix, Exhibit III (B), page 50).

RULES.

Rule 19 of the Rules of the United States Court of Appeals for the Seventh Circuit, 28 U. S. C. A. Rules of the United States Courts of Appeals, 396-7 (Appendix, Exhibit III (C), page 51).

STATEMENT OF FACTS.

Proceeding under the provisions of the All Writs Act, 28 U. S. C. Sec. 1651(a), the Petitioner filed a verified Petition for a Writ of Prohibition, or a Writ of Mandamus, or both of such Writs, in the Court of Appeals for the Seventh Circuit on February 21, 1962, praying that the Respondents, the United States District Court, Northern District of Illinois, Eastern Division, and the Honorable Edwin A. Robson, as Judge of said Court, be prohibited from taking any further steps or proceedings to put the Petitioner on trial a second time, or in the alternative, that the Respondents be compelled to enter an order acquitting or discharging the Petitioner or dismissing the information against him with prejudice on the grounds that a second trial would deny him the constitutional guaranty against double jeopardy (Appendix, Exhibit I, pages 17-25).

The Petition alleges the following:

1. The Petitioner is the defendant in the criminal case of *United States of America* v. *John O'C. FitzGerald*, 60 CR 188, pending before the Honorable Edwin A. Robson, Respondent.

2. The Petitioner was charged in an information with wilfully failing to file income tax returns for each of the years 1954 and 1955 in violation of 26 U. S. C. Sec. 7203 (Appendix, Exhibit I (A), pages 27, 28).

3. The Petitioner pleaded not guilty and his trial before the Honorable Michael L. Igoe, and a jury began on

May 15, 1961. Approximately fifty witnesses testified, and about 1,590 exhibits were received in evidence; the transcript of proceedings covered 2,446 pages. The trial ended on June 6, 1961, when the jury was discharged without a verdict.

4. The facts surrounding the discharge of the jury were stipulated to by the United States Attorney, acting by and under the direction and authority of the Solicitor General of the United States, and made a part of the record by an order entered on December 4, 1961, by the Honorable Edwin A. Robson, Respondent.[2] (Appendix, Exhibit I (B), pages 29-33). These facts are as follows:

(a) At about Four O'Clock P.M., June 6, 1961, as the jury began its deliberations, the Presiding Judge, the Honorable Michael L. Igoe, instructed the deputy marshal to discharge the jury at Ten O'Clock P.M. that same evening if they had not reached a verdict;

(b) The Presiding Judge, the Honorable Michael L. Igoe, then left the Courthouse and did not return until the following morning; he never saw or communicated with the jury after they retired to consider their verdict;

(c) The jury was permitted to deliberate only four and one-half to five hours and never reported that they were deadlocked and unable to reach a verdict;

(d) At Ten O'Clock P.M. that evening, the deputy marshal discharged the jury without a verdict outside the presence of the Presiding Judge, the Honorable Michael L. Igoe, the Petitioner and his attorney; and

(e) The Petitioner did not consent to the discharge of the jury.

---

2. See Footnote 1, *supra*.

5. The manner in which the jury was discharged without having reached a verdict was illegal and improper.

6. The Petitioner filed a Motion on December 18, 1961, before the Honorable Edwin A. Robson, Respondent,[3] requesting an acquittal, or a discharge or a dismissal of the information with prejudice on the ground that a second trial would deny him the constitutional guaranty against double jeopardy (Appendix, Exhibit I (C), pages 34-39).

7. On January 30, 1962, the Honorable Edwin A. Robson, Respondent, entered a Memorandum and Order denying the Petitioner's Motion in each of its alternatives (Appendix, Exhibit I (D), pages 40-45) and entered another Order setting such case for February 20, 1962 to fix a date for trial (Appendix, Exhibit I (E), page 46).[4]

8. The Petitioner is granted immunity from being tried a second time by the Fifth Amendment to the Constitution of the United States and the Respondents have neither the jurisdiction nor the authority to try him again.

9. The Writs prayed for are the only remedy adequate to protect the Petitioner's constitutional right.

On February 27, 1962, the Court of Appeals entered an order summarily denying the Petition for a Writ of Prohibition, or a Writ of Mandamus, or both such Writs, without a hearing (Appendix, Exhibit II, pages 49, 50). The Court of Appeals gave no opinion and stated no reasons for its decision.[5]

---

3. The case in question was reassigned to the Honorable Edwin A. Robson, Respondent, on July 5, 1961.

4. The case was reset by the Honorable Edwin A. Robson, Respondent, on his own Motion, to February 27, 1962, to fix a date for trial (Appendix, Exhibit I (F), pages 47, 48). Subsequently the case was continued to April 24, 1962, to fix a date for trial.

5. Rule 19 of the Rules of the Court of Appeals for the Seventh Circuit provides that if the Court is of the opinion that the facts set forth in a Petition for a Writ of Mandamus or a Writ of Prohibition do not justify a hearing, an order will be made denying the Petition (Appendix, Exhibit III (C), page 51).

REASONS FOR GRANTING THE WRIT.

There are two important reasons why this Court should issue the Writ of Certiorari.

1. It would enable this Court to exercise its power of supervision over a District Court which has discharged a jury from giving a verdict in a manner which is in conflict with the decisions of this Court and a clear departure from the usual and accepted course of judicial proceedings. It also would afford this Court an excellent background in which to more definitively outline the delicate but important relationship between a trial judge and a jury in a criminal case and in particular, the duty of the trial judge to remain accessible to a jury after they have retired to consider their verdict; the circumstances which a trial judge must consider before exercising his discretionary power to discharge a jury from giving a verdict; and the right of the defendant and his attorney to be present at the time the jury is discharged.[6]

2. It would further permit this Court, in the exercise of its power of supervision over Courts of Appeals to determine the appropriateness of the issuance of an extraordinary writ prior to a second trial to protect a defendant's constitutional right not to be tried a second time for the same offenses.

6. In the recent case of *Gori v. United States*, 367 U. S. 364, 367 (1961), which presented a different question involving double jeopardy than the instant case, this Court complained that it could not pass upon the propriety of a mistrial on the skimpy record before it. Unlike the *Gori* case, the facts surrounding the discharge of the jury in the instant case were stipulated to between parties and present a full and uncontestable picture of the manner in which the jury was discharged from giving a verdict (Appendix, Exhibit 1 (B), pages 29-33).

I.

THE MANNER IN WHICH THE JURY HEREIN WAS DISCHARGED FROM GIVING A VERDICT WAS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. This Court Has Held That a Jury Should Not Be Discharged From Giving a Verdict Unless the Trial Judge Considers All the Circumstances At the Time of Discharge and Then Determines, in His Sound Discretion, That There Is a Manifest Necessity for Discharging the Jury.

1. First considering this question in *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579 (1824), this Court set out the duties of a trial judge in discharging a deadlocked jury from giving a verdict and said (Page 580):

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all of the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; * * * But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office * * *"

7. The *Perez* decision clearly required a trial judge to consider *all* the circumstances existing at the time of the jury's discharge. Petitioner believes that the circumstances which the trial judge should consider are: the issues and evidence in the case, the length of time the jury had deliberated, their desire, if any, for addi-

The only question before the jury in the *Perez* case was the identity of the prisoner. After they deliberated about four hours, they reported to the trial judge that they were equally divided and there was no prospect of their ever agreeing upon a verdict, whereupon the trial judge discharged them.[8]

In three cases which followed the *Perez* decision, *Logan* v. *United States*, 144 U. S. 263 (1891); *Dreyer* v. *Illinois*, 187 U. S. 71 (1902); and *Keerl* v. *Montana*, 213 U. S. 136 (1908), this Court held that the discharge of a deadlocked jury from giving a verdict would not bar a second trial of defendant. In each of those cases, however, the jury was returned to Court and personally discharged by the trial judge after he had considered all of the circumstances existing at that time. Further, the judge's determination that there was a manifest necessity for the discharge was in each case based on the presence of one of two factors. Either the jury reported to the trial judge that it was hopelessly deadlocked, or the trial judge, in his sound discretion, determined at the time of the discharge that there was virtually no likelihood that the jury would reach an agreement if given additional time to consider their verdict.[9]

In the instant case, the trial judge never saw or communicated with the jury. He was not informed of the jury's additional instructions on the law, their numerical division and whether there is any expectation that they might reach agreement if permitted to further deliberate, as well as their physical ability to do so.

8. The facts in *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579, 580 (1824), are reported in 2 Wheeler's Cr. Cases 96, 100 (1823).

9. In the *Logan* case, the jury was in retirement to consider their verdict for forty hours and then announced in open court that they were unable to agree. In the *Dreyer* case, the jury deliberated for seventeen and one-half hours before the trial court found that they were unable to agree. In the *Keerl* case, the jury was kept out at least twenty-four hours, and probably more, and the trial court then found that there was a reasonable probability that the jury could not agree.

municated with the jury after they began their deliberations. The jury never reported that they were deadlocked and unable to reach a verdict, or that they were physically unable to continue their deliberations. Moreover, the trial judge decided at Four O'Clock P.M., as the jury began their deliberations, that they would be discharged at Ten O'Clock P.M. that same evening by the deputy marshal if they had not reached a verdict by that time (Appendix, Exhibit I (B), page 30).

At the time of his decision, the trial judge could not know or consider the circumstances which existed thereafter, namely, whether or not the jury desired additional instructions on the law, or expected to reach agreement if permitted to deliberate further and were physically able to do so, as well as how the jury was numerically divided at the time they were discharged by the deputy marshal.[10]

Absent consideration of these circumstances, the trial judge was not able to exercise any discretion as to whether the jury might be hopelessly deadlocked or, on the other hand, reasonably expected to agree on a verdict if permitted to continue deliberating after Ten O'Clock P. M.

10. Although Petitioner contends that *any* arbitrary decision by the trial judge to discharge the jury at a fixed time in the future is improper, the impropriety of the trial judge's action in the instant case is compounded by the fact that the jury was permitted to deliberate less than five hours. In view of evidence, this was clearly an insufficient time for an adequate consideration of whether or not the Petitioner was guilty of the offenses charged. During this short interval, the jurors were expected to analyze the testimony of about fifty witnesses, covering almost 2500 pages in the transcript, and about 1590 exhibits which had been received in evidence (Appendix, Exhibit I, page 18).

B. This Court Has Held That a Defendant and His Attorney Have a Right to Be Present at Every Stage of the Trial.

In *Shields* v. *United States*, 273 U. S. 583 (1927), this Court held that it was improper for a trial judge to communicate with a jury which had retired to consider their verdict in the absence of the defendant and his attorney, and said (Page 589):

> "* * * the defendant, especially in a criminal case (is entitled) to be present from the time the jury is empaneled until its discharge after rendering the verdict." (Words in parentheses added.)

In the instant case, neither the defendant nor his counsel were present at Ten O'Clock P.M. when the jury was discharged by the deputy marshal (Appendix, Exhibit I(B), pages 31, 32). Furthermore, neither of them consented to the discharge of the jury without having reached a verdict (Appendix, Exhibit I, page 18).

II.

THE MANNER IN WHICH THE JURY HEREIN WAS DISCHARGED FROM GIVING A VERDICT WAS A CLEAR DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

The ruling of this Court in *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579 (1824) has been uniformly followed by other courts as the usual and accepted course of judicial procedure in discharging a jury from giving a verdict.[11]

11. Following the *Perez* decision, state courts often have criticized trial judges for the manner in which they discharged juries without a verdict, *e.g.*, instructing the officer in charge of the jury to discharge them at a fixed time in the future if they have not reached a verdict, *Hines* v. *Ohio*, 24 Oh. St. 134 (1873); delegating judicial authority to discharge the jury to the officer in charge of the jury, *State* v. *Beverly Jefferson*, 66 N. C. 309 (1872); and ordering a jury discharged which had not reported to the trial judge that they were unable to agree, *People* v. *Cage*, 48 Cal. 323 (1874).

Traditionally, before discharging a jury from giving a verdict, a trial judge calls the jury into open court and inquires as to whether they had reached a verdict. Upon being told that they had not, the trial judge inquires as to whether they might be able to agree if permitted to continue deliberating. The trial judge personally discharges the jury only after he has determined that their continued deliberations would be to no avail, and the defendant and his attorney are present at that time.

The Petitioner has knowledge of only one case in which a Court approved the discharge of a jury from giving a verdict under circumstances somewhat similar to the instant case. In *Kastel v. United States*, 23 F. 2d 156 (2nd Cir., 1927), the Court of Appeals for the Second Circuit affirmed the conviction of a defendant whose first trial had ended with the discharge of the jury by a deputy marshal after they had indicated to him that they were deadlocked.[12] The Petitioner believes that this case is a sport in the law.

The discharge of a jury otherwise illegal is not saved by the fact that the trial judge did not intend to discharge the jury on the verge of acquitting Petitioner, as the District Court supposed. (Appendix, Exhibit I (D), page 45).

III.

THE COURT OF APPEALS HAD JURISDICTION TO ENTERTAIN THE PETITION FILED THEREIN AND ITS FAILURE TO DO SO IS A CLEAR ABUSE OF ITS DISCRETION.

The Petitioner comes now to the question of whether the Court of Appeals abused its discretion in failing to issue the Writ of Prohibition requiring the Respondents to take no further steps or proceedings to try Petitioner a

12. In the *Kastel* case, however, the Court said that it would have held otherwise if the jury themselves had not given up on agreement. In the instant case, the jury never reported that they were deadlocked and unable to agree.

second time, or the Writ of Mandamus compelling the Respondents to acquit or discharge the Petitioner, or dismiss the information filed against him with prejudice. The Petitioner proceeds in discussing this question on the assumption that he has convinced this Court that by reason of the illegal and improper manner in which the jury was discharged from giving a verdict in his first trial, he has been once placed in jeopardy.

This Court has said that the constitutional guaranty against double jeopardy bars a second trial on the same offenses. *United States* v. *Ball*, 163 U. S. 662, 669 (1895). The Petition filed in the Court of Appeals alleges that the Respondent District Court lacks the jurisdiction and authority to try Petitioner a second time for the plain and simple reason that the Fifth Amendment to the Constitution to the United States forbids it (Appendix, Exhibit I, pages 17-25).

This Court has held that it has the power to issue an extraordinary writ in kindred cases.[13] It has also held that a Court of Appeals has the power to do likewise.[14] It is to be noted that in this, as in other cases where extraordinary writs have been allowed, the resolution of the question posed here has no connection with the merits of the underlying case.

In *Ex Parte Simons*, 247 U. S. 231 (1917), the District Court entered an order transferring the first count of a complaint to the equity side of the court and thus deprived the plaintiff of her constitutionally guaranteed right to a trial by jury. The plaintiff filed a Petition for a Writ of Mandamus to vacate the critical order. This Court held that the District Court erred in determining that the first count of the complaint stated an equity rather than a

13. *DeBeers Mines* v. *United States*, 325 U. S. 213, 217 (1944); *Ex Parte Simons*, 247 U. S. 231 (1917).

14. *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).

common law action and that the issuance of a Writ of Mandamus was proper. Mr. Justice Holmes speaking for an undivided court said (pages 239, 240):

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law."

The *Simons* case is like the case at bar. There, as here, the District Court had decided a question of law upon which the existence of a constitutional right hinged. There, as here, the party moving for the writ based the right to it on the ground that such party would be deprived of a constitutional right absent a definitive ruling prior to the trial. There, as here, the issuance of the writ would spare judicial time and energy which must end in futility. In addition, the Petitioner here will be spared the harassment, the anxieties and expense, of a second trial which is forbidden by the Constitution.

This Court on March 19, 1962, decided the case of *Fong Foo* v. *United States*, No. 64, October Term, 1961. It has not yet been officially reported. In that case the Government filed a Petition for a Writ of Mandamus to compel a District Court to vacate an allegedly erroneous acquittal of a defendant in a criminal case. In the *Fong Foo* case, neither the Court of Appeals nor this Court questioned the procedure invoked by the Government. The Petitioner has here invoked the same procedure.

Other courts have held that the issuance of a Writ of Prohibition is appropriate to prevent the defendant in a criminal case from being deprived of his constitutional guaranty against being tried a second time. *McCabe* v. *Bronx County Court*, 199 N. Y. S. 2d 241 (1960); *Jackson* v. *Superior Court*, 10 Cal. 2d 350, 74 P. 2d 243 (1937).

This is not a case where Petitioner is asking for a correction of a "mere error" which might be effectually corrected on appeal. Petitioner here is asking for a determination of a constitutional right which will be lost unless it is determined now. The extraordinary writs prayed for are the only means available to obtain a determination prior to a second trial. The Petitioner has no right to a Writ of Habeas Corpus because he is not in custody. Nor does he have the right to appeal at this time since the order entered by the Respondents is interlocutory.

The Petitioner's only alternative is to go through a second trial and if convicted, take an appeal to the Court of Appeals. By that time, however, the Petitioner will have been denied his constitutional right not to be tried a second time, and even a reversal of that conviction would not restore that constitutional right. Certainly the Petition filed in the Court of Appeals contained allegations which entitled Petitioner to a hearing, a denial of which is a denial of due process under the Fifth Amendment. *Chessman* v. *Teets*, 350 U. S. 3 (1955).

CONCLUSION

For the reasons herein assigned, this Court ought to issue the Writ of Certiorari in this case.

Respectfully submitted,

JOHN O'C. FITZGERALD, *pro se*,
Petitioner.

CHARLES F. MARINO,
10 South La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

APPENDIX.

EXHIBIT I.

IN THE UNITED STATES COURT OF APPEALS.
For The Seventh Circuit.

John O'C. FitzGerald, *Petitioner,* *vs.* The United States District Court, Northern District of Illinois, Eastern Division; The Honorable Edwin A. Robson, As Judge of the United States District Court, Northern District of Illinois, Eastern Division; and any Judge of the United States District Court, Northern District of Illinois, Eastern Division, to whom the case of *The United States of America* v. *John O'C. FitzGerald*, No. 60 CR 188, pending in the United States District Court, Northern District of Illinois, Eastern Division, may be assigned from time to time. *Respondents.*	No. 13635

PETITION FOR WRIT OF PROHIBITION OR A WRIT OF MANDAMUS OR BOTH A WRIT OF PROHIBITION AND A WRIT OF MANDAMUS.

Petitioner, John O'C. FitzGerald, pro se, and by his attorney, Charles F. Marino, alleges as follows:

1. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1651(a).

2. Petitioner is the accused in the case of *United States of America* v. *John O'C. FitzGerald,* No. 60 CR 188, now pending before the Respondent, the Honorable Edwin A.

Robson, a Judge of the United States District Court, Northern District of Illinois, Eastern Division.

3. In said case referred to in Paragraph 2 hereof, the Petitioner was charged in an information with knowingly and wilfully failing to file income tax returns for each of the years 1954 and 1955 in violation of 26 U. S. C., Section 7203 (a certified copy of which it attached hereto and made a part hereof as Exhibit A.).

4. Petitioner pleaded "not guilty" to each offense charged in said information.

5. The said District Court had jurisdiction of the subject matter of said case and of the person of the Petitioner herein.

6. On May 15, 1961, a trial of the issues in said case was commenced before the Honorable Michael L. Igoe, a Judge of said District Court to whom the said case had been previously assigned, and a jury was duly selected, empaneled and sworn to try the issues between the United States and the Petitioner.

7. Thereafter, about 50 witnesses testified in said case and about 1,590 exhibits were received in evidence in said trial which continued until June 6, 1961; and the transcript of proceedings thereof covered 2,446 pages.

8. The jury, duly sworn for the deliverance of the defendant, John O'C. FitzGerald, retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961, and were put in charge of Frank Reedy, a United States Deputy Marshal.

9. Immediately after the jury retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961, the presiding Judge, the Honorable Michael L. Igoe, in his chambers, informed the attorney for the Government, Harvey M. Silets, the defendant, John O'C. FitzGerald, and

his attorney, Charles F. Marino, that the jury would be discharged at Ten O'Clock P. M., June 6, 1961, if they had not reached a verdict by Ten O'Clock P. M., June 6, 1961.

10. The presiding Judge, the Honorable Michael L. Igoe, at about Four O'Clock P.M., June 6, 1961, instructed Frank Reedy, the United States Deputy Marshal in charge of the jury, to discharge the jury at Ten O'Clock P. M., June 6, 1961, in the event that they had not reached a verdict by Ten O'Clock P. M., June 6, 1961.

11. Between Four O'Clock P. M., June 6, 1961, and Ten O'Clock P. M., June 6, 1961, the members of the jury accompanied by Frank Reedy, the United States Marshal in charge of the jury, left the jury room where they were considering their verdict for a period of about one hour to one hour and thirty minutes, during which time the members of the jury ate their dinner at a public restaurant outside of the building in which the said jury room is situated, and did not deliberate on a verdict.

12. At Ten O'Clock P. M., June 6, 1961, Frank Reedy, the United States Deputy Marshal in charge of the jury, entered the jury room where the jury was then considering of their verdict and made inquiry of the members of the jury in respect of whether they had reached a verdict; the said United States Deputy Marshal was informed by the members of the jury that the jury had not reached a verdict, and having been so informed, the said United States Deputy Marshal, pursuant to the instructions theretofore given to him by the presiding Judge, the Honorable Michael L. Igoe, told the members of the jury that they were discharged; and the members of the jury then went their respective ways.

13. The presiding Judge, the Honorable Michael L. Igoe, was not present at the time the jury was discharged and was not present in his courtroom or in the building in

which the courtroom is situated from shortly after Four-Thirty O'Clock P. M., June 6, 1961, until the following morning, June 7, 1961, at about Nine-Thirty O'Clock A. M.; neither the defendant, John O'C. FitzGerald, nor his attorneys were present at the time the jury was discharged and were not present in the courtroom of the said Honorable Michael L. Igoe or in the building in which such courtroom is situated after Five O'Clock P. M., June 6, 1961, until a few minutes prior to Ten O'Clock A. M., June 7, 1961; neither the defendant, John O'C. FitzGerald, nor his attorneys were notified that the jury had not reached a verdict and were about to be discharged at Ten O'Clock P. M., June 6, 1961; neither the defendant, John O'C. FitzGerald, nor his attorneys were notified that the jury had been discharged at Ten O'Clock P. M., June 6, 1961, until about Ten O'Clock A. M., June 7, 1961.

14. At about Ten O'Clock A. M., June 7, 1961, Edward White, the Deputy Clerk serving in the courtroom of the presiding Judge, the Honorable Michael L. Igoe, called the above-entitled case in open court and in the presence of the Honorable Michael L. Igoe, the Attorney for the Government, Harvey M. Silets, the defendant, John O'C. FitzGerald, and his attorney, Charles F. Marino, announced that "we have a report, Your Honor, that the verdict was not rendered and the jury was hung;" the jury was not present in the said courtroom of the presiding Judge, the Honorable Michael L. Igoe, on June 7, 1961 or at any time thereafter; the jury never saw or communicated with the presiding Judge, the Honorable Michael L. Igoe, and the presiding Judge, the Honorable Michael L. Igoe, never saw or communicated with the jury after the jury retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961.

15. The jury did not personally report at any time to the presiding Judge, the Honorable Michael L. Igoe, or

any other Judge, that they were deadlocked and unable to reach a verdict, and neither the presiding Judge, the Honorable Michael L. Igoe, nor any other judge, personally discharged the jury at any time.

16. On December 4, 1961, an order was entered by the Respondent, the Honorable Edwin A. Robson, pursuant to a stipulation entered into between the Petitioner and the United States, by its attorney, James P. O'Brien, acting by and under the direction and authority of the Solicitor General of the United States, which order made a part of the record in said case the facts pertaining to the discharge of the jury without having reached a verdict as set out in Paragraphs 8 through 15 above (a certified copy of such order is attached hereto and made a part hereof as Exhibit B).

17. The discharge of the jury in the said case without having reached a verdict was improper and illegal for the following reasons:

(a) At the time the jury began its deliberations, the presiding Judge, the Honorable Michael L. Igoe, arbitrarily decided how long they would be allowed to deliberate.

(b) The presiding Judge improperly delegated his judicial authority to discharge the jury by instructing the deputy marshal to discharge the jury at a fixed time in the future if they had not reached a verdict by that time.

(c) The presiding Judge then left the courthouse and did not return until the following morning, almost twelve hours after the jury had been discharged by the deputy marshal without reaching a verdict.

(d) The presiding Judge did not see or communicate with the jury at any time after they began to deliberate, nor did he ever inquire as to their ability to agree upon a verdict if given additional time.

(e) The jury only deliberated four and one half to five hours and never reported to anyone that they were deadlocked and unable to agree.

(f) The jury was discharged by the deputy marshal at the time fixed by the presiding Judge, in the absence of the presiding Judge, the Petitioner, and his attorney.

18. Petitioner did not consent to the discharge of the jury without a verdict having been reached by them.

19. On December 18, 1961, the Respondent (sic. Petitioner) filed a motion, praying for a judgment of acquittal, or in the alternative an order discharging him, or in the alternative an order dismissing the information with prejudice on the grounds that the jury was improperly and illegally discharged without having reached a verdict and that the Petitioner would be twice put in jeopardy for the same offenses by a second trial in violation of the Fifth Amendment of the Constitution of the United States (a certified copy of such motion is attached hereto and made a part hereof as Exhibit C).

20. On January 30, 1962, the Respondent, the Honorable Edwin A. Robson, entered an order and memorandum denying said motion in all its alternatives (a certified copy of such order and memorandum is attached hereto and made a part hereof as Exhibit D).

21. On January 30, 1962, the Respondent, the Honorable Edwin A. Robson, also entered an order setting such case for February 20, 1962, to fix a date for trial (a certified copy of such order is attached hereto and made a part hereof as Exhibit E).

22. On February 7, 1962, the Respondent, the Honorable Edwin A. Robson, on his own motion, entered an order resetting said case to fix a date for trial from February 20, 1962 to February 27, 1962 (a certified copy of

which is attached hereto and made a part hereof as Exhibit F).

23. As a result of the improper and illegal discharge of the jury without a verdict, the Petitioner is granted immunity from being again put in jeopardy for the same offenses and is granted immunity from being subjected to another trial or any part thereof by the Fifth Amendment to the Constitution of the United States, which provides *inter alia* as follows:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

24. The Respondents have neither the jurisdiction nor the authority to try the Petitioner a second time.

25. The Writ of Prohibition or the Writ of Mandamus, or both, which are hereinafter prayed for, are the only remedy adequate to protect the Petitioner from being tried a second time for the same offenses, in that

(a) Petitioner cannot apply for a Writ of Habeas Corpus since he is presently released on bond; and

(b) Petitioner cannot appeal from the order entered by the Respondent, the Honorable Edwin A. Robson, on January 30, 1962 (Exhibit D attached hereto), until after a second trial, by which time the Petitioner would have suffered the irreparable injury of being twice put in jeopardy for the same offenses in violation of the Fifth Amendment to the Constitution of the United States, and would have suffered the harassment, anxiety and expense attendant thereto.

Wherefore, the Petitioner prays (a) that a Writ of Prohibition issue directed to the Respondent, the United States District Court, Northern District of Illinois, Eastern Division, the Honorable Edwin A. Robson, as Judge of such Court, and any other Judge of such Court to whom the case of *United States of America* v. *John O'C. Fitz-*

Gerald, No. 60 CR 188, may be assigned from time to time, directing and commanding the Respondents to refrain from taking any steps or proceedings designed to set the case of *United States of America* v. *John O'C. FitzGerald*, No. 60 CR 188, for trial and from putting the Petitioner upon trial in such case, or in the alternative, (b) that a Writ of Mandamus issue directed to the United States District Court, Northern District of Illinois, Eastern Division, the Honorable Edwin A. Robson, as Judge of such Court, and any other Judge of such Court to whom such case may be assigned from time to time, directing and commanding said Respondents to enter an order vacating and setting aside the order entered by the Honorable Edwin A. Robson (Exhibit D attached hereto) and to enter an order allowing the Motion of Petitioner (Exhibit C attached hereto), in any or all of its alternatives or, in another alternative, (c) to issue both the Writ of Mandamus and the Writ of Prohibition, as above prayed for.

The Petitioner further prays that this Court issue a rule directed to the Respondents to show cause why such Writs, or one of them, as are herein prayed for, should not be issued and that such rule to show cause be returnable on a day to be fixed by this Court, and, if such return appears to raise issues which require a hearing, to set a time for a hearing thereon.

The Petitioner further prays for such other and further relief as may be required or deemed appropriate by this Court.

The Petitioner further prays for leave to file a brief in support of this Petition.

John O'C. FitzGerald,
Petitioner, pro se.

Charles F. Marino,
Attorney for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

AFFIDAVIT.

John O'C. FitzGerald, being first duly sworn on oath, deposes and says that he has read the above and foregoing Petition for Writ of Prohibition or a Writ of Mandamus or Both a Writ of Prohibition and a Writ of Mandamus by him subscribed and that the same is true.

John O'C. FitzGerald.

Subscribed and sworn to before me this 19th day of February, 1962.

Grace K. Murakami,
Notary Public.

(Notarial Seal)

EXHIBIT 1-A

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

United States of America *vs.* John O'C. FitzGerald.	No. 60 CR 188 (26 United States Code, Section 7203).

The UNITED STATES ATTORNEY CHARGES:

That during the calendar year 1954,

JOHN O'C. FITZGERALD,

who was a resident of the City of Chicago, State of Illinois, had and received a gross income of $26,804.03; that by reason of such income he was required by law, after the close of the calendar year 1954 and on or before April 15, 1955, to make an income tax return to the Director of Internal Revenue for the Chicago Internal Revenue District at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said Director of Internal Revenue, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code of 1954; 26 United States Code, Section 7203.

COUNT TWO.

The UNITED STATES ATTORNEY FURTHER CHARGES:

That during the calendar year 1955,

JOHN O'C. FITZGERALD,

who was a resident of the City of Chicago, State of Illinois, had and received a gross income of $46,415.87; that by reason of such income he was required by law, after the close of the calendar year 1955 and on or before July 15, 1956, to make an income tax return to the Director of Internal Revenue for the Chicago Internal Revenue District at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said Director of Internal Revenue, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code of 1954; 26 United States Code, Section 7203.

R. Tieken,
United States Attorney.

WAB:hgk

EXHIBIT I-B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division.

United States of America,
Plaintiff.
vs.
John O'C. FitzGerald,
Defendant.
No. 60 CR 188.

ORDER.

This cause coming on to be heard pursuant to a stipulation heretofore entered into by and between the plaintiff, United States of America, by its attorney, James P. O'Brien, acting by and under the direction and authority of the Solicitor General of the United States, and the defendant, John O'C. FitzGerald, acting pro se, and his attorney, Charles F. Marino, and the Court having considered the stipulation, and being fully advised with respect thereto.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order heretofore entered on June 7, 1961, in the above-entitled cause by the Honorable Michael L. Igoe, which order reads as follows:

"ORDER

"This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and

the Jury heretofore elected, empaneled and sworn herein also come and report to the Court that they are deadlocked and unable to agree on a verdict therefore it is

"ORDERED by the Court that the Jury be and they are hereby discharged and that this cause be and the same is hereby set for trial on October 9, 1961 and it is

"FURTHER ORDERED that the defendant's present bond shall remain in full force and effect."

be vacated and expunged from the record in the above-entitled cause.

FURTHER ORDERED that the following findings of fact be made a part of the record in the above-entitled cause:

1. The jury, duly sworn for the deliverance of the defendant, John O'C. FitzGerald, retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961, and were put in charge of Frank Reedy, a United States Deputy Marshal.

2. Immediately after the jury retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961, the presiding Judge, the Honorable Michael L. Igoe in his chambers, informed the attorney for the Government, Harvey M. Silets, the defendant, John O'C. FitzGerald, and his attorney, Charles F. Marino, that the jury would be discharged at Ten O'Clock P. M., June 6, 1961, if they had not reached a verdict by Ten O'Clock P. M., June 6, 1961.

3. The presiding Judge, the Honorable Michael L. Igoe, at about Four O'Clock P. M., June 6, 1961, instructed Frank Reedy, the United States Deputy Marshal in charge of the jury, to discharge the jury at Ten O'Clock P. M., June 6, 1961, in the event that they had not reached a verdict by Ten O'Clock P. M., June 6, 1961.

4. Between Four O'Clock P. M., June 6, 1961, and Ten O'Clock P. M., June 6, 1961, the members of the jury accompanied by Frank Reedy, the United States Marshal in

charge of the jury, left the jury room where they were considering their verdict for a period of about one hour to one hour and thirty minutes, during which time the members of the jury ate their dinner at a public restaurant outside of the building in which the said jury room is situated, and did not deliberate on a verdict.

5. At Ten O'Clock P. M., June 6, 1961, Frank Reedy, the United States Deputy Marshal in charge of the jury, entered the jury room where the jury was then considering of their verdict and made inquiry of the members of the jury in respect of whether they had reached a verdict; the said United States Deputy Marshal was informed by the members of the jury that the jury had not reached a verdict, and having been so informed, the said United States Deputy Marshal, pursuant to the instructions theretofore given to him by the presiding Judge, the Honorable Michael L. Igoe, told the members of the jury that they were discharged; and the members of the jury then went their respective ways.

6. The presiding Judge, the Honorable Michael L. Igoe, was not present at the time the jury was discharged and was not present in his courtroom or in the building in which the courtroom is situated from shortly after Four-Thirty O'Clock P. M., June 6, 1961, until the following morning, June 7, 1961, at about Nine-Thirty O'Clock A. M.; neither the defendant, John O'C. FitzGerald, nor his attorneys were present at the time the jury was discharged and were not present in the courtroom of the said Honorable Michael L. Igoe or in the building in which such courtroom is situated after Five O'Clock P. M., June 6, 1961, until a few minutes prior to Ten O'Clock A. M., June 7, 1961; neither the defendant, John O'C. FitzGerald, nor his attorneys were notified that the jury had not reached a verdict and were about to be discharged at Ten O'Clock P. M., June 6, 1961; neither the defendant, John O'C. Fitz-

Gerald, nor his attorneys were notified that the jury had been discharged at Ten O'Clock P. M., June 6, 1961, until about Ten O'Clock A. M., June 7, 1961.

7. At about Ten O'Clock A. M., June 7, 1961, Edward White, the Deputy Clerk serving in the courtroom of the presiding Judge, the Honorable Michael L. Igoe, called the above-entitled case in open court and in the presence of the Honorable Michael L. Igoe, the Attorney for the Government, Harvey M. Silets, the defendant, John O'C. Fitz-Gerald, and his attorney, Charles F. Marino, announced that "we have a report, Your Honor, that the verdict was not rendered and the jury was hung;" the jury was not present in the said courtroom of the presiding Judge, the Honorable Michael L. Igoe, on June 7, 1961, or at any time thereafter; the jury never saw or communicated with the presiding Judge, the Honorable Michael L. Igoe, and the presiding Judge, the Honorable Michael L. Igoe, never saw or communicated with the jury after the jury retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961.

8. The jury did not personally report at any time to the presiding Judge, the Honorable Michael L. Igoe, or any other judge, that they were deadlocked and unable to reach a verdict; and neither the presiding Judge, the Honorable Michael L. Igoe, nor any other judge, personally discharged the jury at any time.

9. The findings of fact herein contained are to supplement and not to supplant the matters which appear and are contained in the record and transcript of proceedings in *this cause*, except for the order of June 7, 1961 hereby vacated and expunged from the record, and except for such part or parts of the record and transcript of proceedings as may be in conflict with this order and the findings of fact herein contained.

FURTHER ORDERED that the defendant's bond shall remain in full force and effect.

Enter:

Edwin A. Robson.

Judge.

Date: Dec. 4, 1961.

EXHIBIT I-C.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division.

United States of America,
Plaintiff,
vs.
John O'C. FitzGerald,
Defendant.
} No. 60 CR 188.

MOTION.

The defendant, John O'C. FitzGerald, pro se, and by his attorney, Charles F. Marino, moves the Court:

(a) for a judgment of acquittal on the offenses charged in the Information filed herein; or in the alternative,

(b) for an order discharging the defendant from further prosecution for the offenses charged in the Information filed herein, or in the alternative,

(c) for an order dismissing the Information filed herein with prejudice.

The grounds for this Motion are that the defendant has been in former jeopardy for the offenses charged in the Information herein, and he would be twice put in jeopardy for said offenses by a second trial in violation of the Fifth Amendment to the Constitution of the United States which provides, *inter alia*, as follows:

"* * * nor shall any person be subject, for the same offense to be twice put in jeopardy of life or limb;"

all of which is shown by the record and transcript of proceedings herein, and in particular by the following facts contained therein:

1. The plaintiff filed an Information herein charging the defendant with wilfully failing to file income tax returns for each of the years 1954 and 1955 in violation of Section 7203 of Title 26, United States Code;

2. The defendant pleaded not guilty to each and every offense charged in said Information;

3. The Court had jurisdiction of the subject matter and of the defendant herein;

4. On May 15, 1961, a trial of the issues herein commenced before the Honorable Michael L. Igoe, a judge of this Court, and a jury was duly selected and sworn herein;

5. Thereafter, about fifty witnesses testified and about 1,500 exhibits were received in evidence in said trial which continued until June 6, 1961; and the transcript of proceedings thereof covered 2,446 pages.

6. The jury, duly sworn for the deliverance of the defendant, John O'C. FitzGerald, retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961, and were put in charge of Frank Reedy, a United States Deputy Marshal.

7. Immediately after the jury retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961, the presiding Judge, the Honorable Michael L. Igoe, in his chambers, informed the attorney for the Government, Harvey M. Silets, the defendant, John O'C. FitzGerald, and his attorney, Charles F. Marino, that the jury would be discharged at Ten O'Clock P. M., June 6, 1961, if they had not reached a verdict by Ten O'Clock P. M., June 6, 1961.

8. The presiding Judge, the Honorable Michael L. Igoe, at about Four O'Clock P. M., June 6, 1961, instructed

Frank Reedy, the United States Deputy Marshal in charge of the jury, to discharge the jury at Ten O'Clock P. M., June 6, 1961, in the event that they had not reached a verdict by Ten O'Clock P. M., June 6, 1961.

9. Between Four O'Clock P. M., June 6, 1961, and Ten O'Clock P. M., June 6, 1961, the members of the jury accompanied by Frank Reedy, the United States Marshal in charge of the jury, left the jury room where they were considering their verdict for a period of about one hour to one hour and thirty minutes, during which time the members of the jury ate their dinners at a public restaurant outside of the building in which the said jury room is situated, and did not deliberate on a verdict.

10. At Ten O'Clock P. M., June 6, 1961, Frank Reedy, the United States Deputy Marshal in charge of the jury, entered the jury room where the jury was then considering of their verdict and made inquiry of the members of the jury in respect of whether they had reached a verdict; the said United States Deputy Marshal was informed by the members of the jury that the jury had not reached a verdict, and having been so informed, the said United States Deputy Marshal, pursuant to the instructions theretofore given to him by the presiding Judge, the Honorable Michael L. Igoe, told the members of the jury that they were discharged; and the members of the jury then went their respective ways.

11. The presiding Judge, the Honorable Michael L. Igoe, was not present at the time the jury was discharged and was not present in his courtroom or in the building in which the courtroom is situated from shortly after Four-Thirty O'Clock P. M., June 6, 1961, until the following morning, June 7, 1961, at about Nine-Thirty O'Clock A. M.; neither the defendant, John O'C. FitzGerald, nor his attorneys were present at the time the jury was dis-

charged and were not present in the courtroom of the said Honorable Michael L. Igoe or in the building in which such courtroom is situated after Five O'Clock P. M., June 6, 1961, until a few minutes prior to Ten O'Clock A. M., June 7, 1961; neither the defendant, John O'C. FitzGerald, nor his attorneys were notified that the jury had not reached a verdict and were about to be discharged at Ten O'Clock P. M., June 6, 1961; neither the defendant, John O'C. FitzGerald, nor his attorneys were notified that the jury had been discharged at Ten O'Clock P. M., June 6, 1961, until about Ten O'Clock A. M., June 7, 1961.

12. At about Ten O'Clock A. M., June 7, 1961, Edward White, the Deputy Clerk serving in the courtroom of the presiding Judge, the Honorable Michael L. Igoe, called the above-entitled case in open court and in the presence of the Honorable Michael L. Igoe, the Attorney for the Government, Harvey M. Silets, the defendant, John O'C. FitzGerald, and his attorney, Charles F. Marino, announced that "we have a report, Your Honor, that the verdict was not rendered and the jury was hung," the jury was not present in the said courtroom of the presiding Judge, the Honorable Michael L. Igoe, on June 7, 1961, or at any time thereafter; the jury never saw or communicated with the presiding Judge, the Honorable Michael L. Igoe, and the presiding Judge, the Honorable Michael L. Igoe, never saw or communicated with the jury after the jury retired to consider of their verdict at about Four O'Clock P. M., June 6, 1961.

13. The jury did not personally report at any time to the presiding Judge, the Honorable Michael L. Igoe, or any other judge, the they were deadlocked and unable to reach a verdict; and neither the presiding Judge, the Honorable Michael L. Igoe, nor any other judge, personally discharged the jury at any time.

This motion should be granted for the reason that there was no necessity for the discharge of said jury, manifest or otherwise; said discharge was a result of an arbitrary and capricious act of the Presiding Judge, the Honorable Michael L. Igoe; the said Presiding Judge did not know, much less take into consideration the circumstances which existed at the time the jury was discharged, and he could not determine that there was a necessity, manifest or otherwise, for discharging the jury at that time; the Presiding Judge delegated his discretionary power to discharge the jury to the Deputy Marshal in charge of the jury; neither the defendant nor his attorneys were present at the time of the discharge of the jury; the discharge of the jury herein was improper and illegal and from the time the jury was duly selected and sworn to try the issues herein, or at least, from the time evidence was first introduced herein on May 16, 1961, the defendant was in jeopardy and continued to be in jeopardy from that time until the jury was improperly and illegally discharged and went their respective ways on June 6, 1961, at which time said jeopardy terminated; the present cause and information is the same cause and information as that above in which the jury was improperly and illegally discharged; said improper and illegal discharge of the jury is in law an acquittal of the defendant; the defendant is granted immunity by the Fifth Amendment of the Constitution of the United States from being again put in jeopardy for the offenses charged in the Information herein and is granted immunity against being subjected to another trial on the issues raised therein; the defendant is thereby entitled to the relief and remedies requested herein.

John O'C. FitzGerald,
Defendant, pro se.

Charles F. Marino,
Attorney for the Defendant.

JOHN O'C. FITZGERALD, being first duly sworn on oath, deposes and says that he has read the above and foregoing Motion by him subscribed, and that the factual statements contained therein are true.

John O'C. Fitzgerald.

Subscribed and sworn to before me this day of December, 1961.

Mildred C. Rankin.
Notary Public.

(Seal)

EXHIBIT 1-D.

In The United States District Court.

For The Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff*, *vs.* John O'C. FitzGerald, *Defendant.*	No. 60 CR 188

MEMORANDUM AND ORDER ON MOTION OF DEFENDANT FOR A JUDGMENT OF ACQUITTAL, ET CETERA.

Defendant, charged upon information with violation of the income tax laws (26 U. S. C. § 7203) for failure to file income tax returns for 1954 and 1955, seeks by a motion in the alternative for

(a) a judgment of acquittal on the offenses charged in the information filed, or

(b) an order discharging him from further prosecution for the alleged offense, or

(c) an order dismissing the information with prejudice.

The situation out of which this motion arose was that on June 6, 1961, after some thirteen trial days, the jury began their deliberations at approximately 4:00 p. m. After the jury retired, it is stated that this colloquy oc-

curred in chambers, with defendant and both counsel present:

"The Court: Now what about this jury? are you folks willing to agree that in the event they reach a verdict they may sign and seal and separate, and the verdict will be read here tomorrow morning?

"Mr. FitzGerald: We agree.

"Mr. Silets: That is agreeable with the Government.

"The Court: All right."

Thereafter there was a further colloquy.

"Mr. Silets: Judge, we were just thinking if the jury gets hung that there is no way for the Court to give them Allen case instruction which talked about deliberations.

"The Court: They are not going to be hung. They can bring the verdict in by ten o'clock or they don't have that verdict.

"Mr. FitzGerald: I am sure they will.

"The Court: I am not going to keep the jury out all night.

"Mr. FitzGerald: I am not joining in that, Your Honor.

"The Court: You are not joining in what?

"Mr. FitzGerald: At the request that the Court give that Allen instruction.

"Mr. Silets: May I inquire as to the procedure? Mr. White indicated that if they don't return a verdict they will be discharged?

"The Court: At ten o'clock.

"Mr. Silets: What time are they to take?

"The Court: Until ten o'clock.

"Mr. Silets: Until ten o'clock.

"The Court: Yes, at ten o'clock tonight.

"Mr. Silets: Oh, I thought it would be tomorrow morning?

"The Court: No, I wouldn't keep a jury locked up like that. If they don't reach a verdict by ten o'clock, there is no verdict.

"Mr. Silets: Then we would have to try it again?
"The Court: Yes, sir.
"Mr. Silets: Okay."

The Court is of the opinion there is no legal basis for the instant motion in any of its alternative phases and it is therefore denied. The principle of law applicable was clearly expounded by the United States Supreme Court in 1824 and has remained unchanged. That Court in *United States v. Joseph Perez*, 22 U. S. (9 Wheat.) 579, said:

> "The prisoner, Joseph Perez, was put upon trial for a capital offence, and the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner, or of the attorney for the United States.
>
> The question, therefore, arises, whether the discharge of the jury, by the court, from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had.
>
> "We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be ex-

tremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware, that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

Most recently the Supreme Court has reiterated the above doctrine in *Gori v. United States*, 367 U. S. 364 (1961), saying at page 367:

> "Since 1824 it has been settled law in this Court that 'The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment'."

As dictum it was said in *Green v. United States*, 355 U. S. 184, 188 (1957):

> "Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. . . . This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. *At the same time jeopardy is not regarded as having come to an end so as to bar a* second trial in those

> cases where 'unforeseeable circumstances * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict'." (Emphasis ours.)

In *Dreyer v. Illinois*, 187 U. S. 71 (1902), it was decided that if the jury in a criminal cause be discharged by the court because of their being unable to agree upon a verdict, the accused, if tried a second time, cannot be said to have been put twice in jeopardy of life or limb, whether regard be had to the Fifth or the Fourteenth Amendment. In that case, the cause was submitted to the jury at four o'clock in the afternoon and the jury was kept together until nine o'clock, and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case. The contention was made that notwithstanding the recital in the record that the jury was discharged by the court because they were unable to agree upon a verdict, such discharge was without moral or physical necessity and operated as an acquittal of the defendant. The Court held the *Perez* case, *supra*, applicable, leading to a conclusion "adverse to the contention of the accused that he was put twice in jeopardy."

Very recently the Second Circuit Court of Appeals held in *United States v. Cording*, 290 F. 2d 392, 393 (1961), that

> "Since the jury had declared its inability to agree on a verdict, the action of the court in discharging the jury was a proper exercise of its discretion. In these circumstances it is well established that a second trial may be had without running afoul of the prohibition against double jeopardy."

Defendant assails the trial court's action, asserting that the jury was permitted to deliberate a total of only about five hours; that it was an unwarranted delegation of

authority by the trial judge to his minute clerk to discharge the jury; that the jury was discharged without defendant's consent and out of the presence of the defendant, counsel and the Court.

The colloquy quoted above, however, discloses that the trial judge made a deliberate decision as to when the jury should be discharged for failure to agree, that it was the trial judge's decision and not his minute clerk's, that it was announced in the presence of counsel. It is clear that it was not done at a moment when it was believed the jury was about to acquit the defendant and therefore knowingly deprived him of an acquittal.

The Court therefore concludes that Judge Igoe exercised the discretion lodged in him in accordance with the best dictates of his judgment. The discharge of the jury pursuant to his order was valid and defendant is not being subjected to a second trial in violation of his constitutional right not to be subjected to double jeopardy for the same offense.

The motion in all its alternatives is denied.

Edwin A. Robson,
Judge.

January 30, 1962.

EXHIBIT I-E.

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

Tuesday, January 30, 1962.

Present: Honorable Edwin A. Robson, District Judge.

United States of America,
vs.
John O'C. FitzGerald. } No. 60 CR 188

The Court being duly advised it is

ORDERED that leave be and it hereby is granted to the defendant to file further motions within 20 days herefrom and that this cause be and it hereby is continued to February 20, 1962 for report on status of said motions and to set the cause for trial and/or pre-trial conference.

EXHIBIT 1-F

In the United States District Court,

For the Northern District of Illinois

Eastern Division.

Wednesday, February 7, 1962.

Present: Honorable Edwin A. Robson, District Judge.

United States of America,
vs.
John O'C. FitzGerald. } No. 60 CR 188

It is ORDERED by the Court that this cause be and it hereby is reset from February 20, 1962 to February 27, 1962 for report on filing of further motions and to set the cause for trial and/or pre-trial conference.

United States of America:
Northern District of Illinois. } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Information filed Apr. 25, 1960, Order entered Dec. 4, 1961 on Stipulation, etc., Motion for Acquittal, Discharge and Dismissal filed Dec. 18, 1961, Memorandum and Order on Motion of Defendant for a Judgment of Acquittal, etc., filed Jan. 30, 1962 and Order entered Feb. 7, 1962 resetting trial, and Order dated Jan 30, 1962 setting matter for Feb. 20, 1962 to report on motions and to set date for trial or pre-trial now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 19th day of Feb., A. D. 1962.

Roy H. Johnson,
Clerk.

By Elizabeth H. Nelson,
Deputy Clerk.

(Seal)

EXHIBIT II.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, February 27, 1962.

Before:

Hon. John S. Hastings, Chief Judge.

Hon. Latham Castle, Circuit Judge.

John O'C. FitzGerald,
Petitioner,

vs.

The United States District Court, Northern District of Illinois, Eastern Division; The Honorable Edwin A. Robson, As Judge of the United States District Court, Northern District of Illinois, Eastern Division; and any Judge of the United States District Court, Northern District of Illinois, Eastern Division, to whom the case of *the United States of America v. John O'C. FitzGerald*, No. 60 CR 188, pending in the United States District Court, Northern District of Illinois, Eastern Division, may be assigned from time to time.
Respondents.

No. 13635

Petition for Writ of Prohibition of a Writ of Mandamus or both a Writ of Prohibition and a Writ of Mandamus.

This matter comes before the Court on the petition of John O'C. FitzGerald, pro se, and by his attorney, Charles F. Marino, for a writ of prohibition or a writ of mandamus, or both a writ of prohibition and a writ of mandamus, to direct the respondents to refrain from taking any steps or proceedings designed to set the case of United States of

America *vs.* John O'C. FitzGerald, No. 60 CR 188, for trial, and for other relief.

On consideration whereof, IT IS HEREBY ORDERED that the said petition of John O'C. FitzGerald be, and the same is hereby, DENIED.

A True Copy:

Teste:

Kenneth J. Carrick,

(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

EXHIBIT III-A

United States Constitution, Amendment V, providing in pertinent part:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

EXHIBIT III-B

28 U. S. C. Sec. 1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

EXHIBIT III-C

Rule 19 of the Rules of the United States Court of Appeals for the Seventh Circuit, 28 U. S. C. A. Rules of the United States Courts of Appeals, 396 7:

"(a) Petitions for Writs, Filing. A party desiring to secure a writ of mandamus, prohibition or other extraordinary writ, shall file his petition therefor in quadruplicate setting forth the facts upon which he claims to be entitled to the writ, which shall be sworn to and may be accompanied by such brief or memorandum as he may desire to submit. The petition and brief of petitioner may be typewritten. He shall also pay the required fee. The clerk shall thereupon docket his petition and submit the petition and accompanying papers to the court.

"(b) Rule to Show Cause Denial. If the court is of the opinion that the facts set forth in the petition justify a hearing a rule to show cause why a writ should not issue will be entered, returnable as promptly as the situation permits; if of the contrary opinion, an order will be made denying the petition. Any pleading or brief of respondent may be typewritten.

"(c) Service of Rule Answer. If a rule to show cause is entered, the clerk shall deliver one certified copy to the petitioner, and one to the respondent. The respondent shall file an answer to the petition on or before the return day specified in the rule unless the time be enlarged by the court or a judge thereof. The petition and answer shall be given preference over other civil cases and shall be brought on for hearing at the earliest convenient session of the court after the expiration of the time fixed for filing briefs."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Cases:

Banker's Life and Casualty Co. v. *Holland*, 346 U.S. 379	4
Cobbledick v. *United States*, 325 U.S. 196	4
Gori v. *United States*, 367 U.S. 364	5
Logan v. *United States*, 144 U.S. 263	5
Parr v. *United States*, 351 U.S. 513	4
Roche v. *Evaporated Milk Association*, 319 U.S. 21	4
Simmons v. *United States*, 142 U.S. 148	5
Thompson v. *United States*, 155 U.S. 271	5
U.S. Alkali Ass'n v. *United States*, 325 U.S. 196	4
United States v. *Perez*, 9 Wheat. 579	3, 5
Wade v. *Hunter*, 336 U.S. 684	5

636601—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 825

JOHN O'C. FITZGERALD, PETITIONER

v.

THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the Memorandum and Order entered by the district court (Pet. App. 40–45) nor the order entered by the court of appeals (Pet. App. 49–50) has yet been reported.

JURISDICTION

The order of the court of appeals, denying the petition for a writ of prohibition or mandamus, was entered on February 27, 1962 (Pet. 49). The petition for a writ of certiorari was filed on March 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in denying a petition for a writ of prohibition or mandamus, which was sought by petitioner to prevent his retrial.

2. Whether, following the discharge of a jury unable to agree, petitioner could be retried without violating the double jeopardy prohibitions of the Fifth Amendment.

STATEMENT

Petitioner was charged by information in the United States District Court for the Northern District of Illinois with wilfully failing to file income tax returns for the years 1954 and 1955, in violation of 26 U.S.C. 7203 (Pet. App. 27–28). On June 6, 1961, after some thirteen trial days, the jury retired to consider their verdict at about 4:00 p.m. Immediately thereafter, the presiding judge in his chambers informed petitioner, his attorney, Charles F. Marino, and the attorney for the government that the jury would be discharged if they did not reach a verdict by ten o'clock that evening. The judge instructed the United States Deputy Marshal to discharge the jury if they were unable to agree by that time (Pet. App. 30). The jury, not having reached a verdict by 10:00 p.m., were accordingly discharged by the United States Deputy Marshal (Pet. App. 31). Neither the presiding judge, petitioner, nor the attorneys were present at the time of the discharge (Pet. App. 31), but all were present the following morning in court when the Deputy Clerk announced that the case had

ended with a hung jury (Pet. App. 32). The case was thereupon set for a new trial.

In December 1961, petitioner filed a motion in the United States District Court seeking alternatively a judgment of acquittal or an order dismissing the offenses charged in the Information, on the grounds that a retrial would place him in double jeopardy for the same offense (Pet. App. 34). Petitioner alleged that the trial judge had abused his discretion in that he had not taken "into consideration the circumstances which existed at the time the jury was discharged * * *" and had improperly "delegated his discretionary power to discharge the jury to the Deputy Marshal * * *." He further alleged that the discharge of the jury had been wrongful because "neither the defendant nor his attorney were present at the time of the discharge." (Pet. App. 38.) The district court denied the motion. After noting the colloquy which had taken place in chambers after the jury had retired to consider its verdict (Pet. App. 41–42), the court found that "the trial judge made a deliberate decision as to when the jury should be discharged for failure to agree, that it was the trial judge's decision and not his minute clerk's, that it was announced in the presence of counsel." The court concluded that the presiding judge had "exercised the discretion lodged in him in accordance with the best dictates of his judgment," and, accordingly, on the authority of *United States* v. *Perez*, 9 Wheat. 579, held that a retrial of petitioner would not subject him "to double jeopardy for the same offense." (Pet. App. 45.)

On February 21, 1962, petitioner filed a petition for a writ of prohibition, or a writ of mandamus, or both, in the United States Court of Appeals for the Seventh Circuit, praying that the United States District Court, or any judge thereof, be prohibited from trying petitioner a second time (Pet. App. 17–24). The petition set forth substantially the same allegations of error which were contained in the lower court motion and further alleged that "petitioner did not consent to the discharge of the jury without a verdict having been reached by them" (Pet. App. 22). The court of appeals denied the petition (Pet. App. 49–50).

ARGUMENT

1. The court of appeals properly declined to grant the petition for a writ of prohibition or mandamus. See *Parr* v. *United States*, 351 U.S. 513, 520–521; *Banker's Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383–385; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21. No special circumstances existed which would have justified such extraordinary relief. See *U.S. Alkali Assn.* v. *United States*, 325 U.S. 196, 202–203. "[E]xtraordinary writs * * * may not be used to thwart the congressional policy against piecemeal appeals," (*Parr* v. *United States, supra*, 351 U.S. at 520–521), especially in a criminal case (cf. *Cobbledick* v. *United States*, 309 U.S. 323). If petitioner be convicted on retrial, and that conviction be affirmed, it would then be time enough to determine whether the merits of the district court's order warranted review by this Court.

2. Petitioner's contentions are in any event without merit. Under the settled principles first announced in *United States* v. *Perez*, 9 Wheat. 579 (see Pet. App. 42–43), and consistently followed by this Court (see *Simmons* v. *United States*, 142 U.S. 148, 153–154; *Logan* v. *United States*, 144 U.S. 263, 297–298; *Thompson* v. *United States*, 155 U.S. 271, 274; *Wade* v. *Hunter*, 336 U.S. 684, 689), a district court has broad discretion to determine whether or not and under what circumstances the jury should be discharged. The exercise of this discretion should not be disturbed on review, except under the most unusual circumstances (see *Gori* v. *United States*, 367 U.S. 364, 369). Especially do these principles hold true in the present case wherein the petitioner offered no objection to the trial court's announced intention to discharge the jury at 10:00 p.m. in the event that the jurors were unable to agree (see Pet. App. 41–42).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
NORMAN SEPENUK,
Attorneys.

APRIL 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962

Office-Supreme Court, U.S.
FILED
MAY 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 825

JOHN O'C. FITZGERALD,

Petitioner,

vs.

MICHAEL L. IGOE, as Judge of the United States District Court, Northern District of Illinois, Eastern Division; EDWIN A. ROBSON, as Judge of the United States District Court, Northern District of Illinois, Eastern Division; and any Judge of the United States District Court, Northern District of Illinois, Eastern Division, to whom the case of United States of America vs. John O'C. FitzGerald, No. 60 CR 188, pending in the United States District Court, Northern District of Illinois, Eastern Division, may be assigned from time to time,

Respondents.

REPLY TO BRIEF OF THE UNITED STATES.

JOHN O'C. FITZGERALD, *Pro Se,*
Petitioner,

CHARLES F. MARINO,
10 S. La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

THE DARNELL-GARNER PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 825.

JOHN O'C. FITZGERALD,

Petitioner,

vs.

MICHAEL L. IGOE, as Judge of the United States District Court, Northern District of Illinois, Eastern Division; EDWIN A. ROBSON, as Judge of the United States District Court, Northern District of Illinois, Eastern Division; and any Judge of the United States District Court, Northern District of Illinois, Eastern Division, to whom the case of United States of America vs. John O'C. FitzGerald, No. 60 CR 188, pending in the United States District Court, Northern District of Illinois, Eastern Division, may be assigned from time to time,

Respondents.

REPLY TO BRIEF OF THE UNITED STATES.

Petitioner calls this Court's attention to the following matters in the brief for the United States in opposition to the granting of a Writ of Certiorari.

1. The Government contends that no special circumstances exist which warrant the issuance of the writs requested in the Court below, and says that (Gov. Br., page 4):

> "If petitioner be convicted on retrial, and that conviction be affirmed, it would then be time enough to determine whether the merits of the district court order warranted review by this Court."

In taking this position, the Government treats too lightly the Petitioner's constitutional guaranty against double jeopardy which this Court has held bars a second trial for the same offenses. *United States* v. *Ball*, 163 U. S. 662, 669 (1895). If the Petitioner must await a second trial and a conviction before he can receive a determination by either the Court of Appeals or this Court on the merits of his plea of double jeopardy, he will be denied his constitutional right not to be tried a second time. Since even a reversal of such a conviction would not restore that constitutional right, the issuance of the writs requested prior to a second trial is the only adequate remedy available to the Petitioner.

In the recent case of *McCabe* v. *Bronx County Court*, 199 N. Y. S. 2d 241 (1960), a state court issued a Writ of Prohibition to protect a defendant from being tried a second time and clearly answered the question which is now before this Court (page 246):

> "The guarantee is that a person shall not be subject to the risk of a second trial. Nor may this protection be abridged or curtailed by holding that a defendant may assert it during any stage of the new trial. The immunity protects him against being subjected to another trial—any part of another trial. • • • Therefore, reason and logic indicate that it is permissible to raise the plea of double jeopardy, if a person chooses, before the commencement of another trial and in whatever forum is proper and available."

This important question of whether the merits of a plea of double jeopardy can be raised in a Court of Appeals or this Court prior to a second trial has not been decided by this Court. In the *Ball* case, the defendant had been retried before the question of double jeopardy was presented to this Court. However, in *Ex Parte Simons*, 247 U. S. 231, 239, 240 (1917), Mr. Justice Holmes said that the time for dealing with an order which wrongly deprived a party to a trial by jury was "now" prior to trial.

2. The Government concludes that the jury was discharged in the instant case because it was *unable to agree*. This is not in accordance with the facts.

On page 2 of the Government's brief in the second of the "Questions Presented," it says:

> "2. Whether, following the discharge of a jury *unable to agree*, petitioner could be retried without violating the double jeopardy prohibitions of the Fifth Amendment." (Emphasis added.)

To like effect, so far as is critical here is the last sentence of the Government's Argument (Gov. Br., page 5).

The jury, however, never said that they were *unable to agree*. To the contrary, their deliberations were sharply cut off by the Deputy Marshal without any request by them (Pet. Appendix, Exhibit I B, page 30).

Furthermore, on pages 2 and 3 of the Government's brief, it says:

> "Neither the presiding judge, petitioner, nor the attorneys were present at the time of the discharge (Pet. App. 31), but all were present the following morning in court when the Deputy Clerk announced that the case had ended with a hung jury (Pet. App. 32). The case was thereupon set for a new trial."

The fact relating to this statement is that the Deputy Clerk said:

> "We have a report, Your Honor, that the verdict was not rendered and the jury was hung."

This was said in the absence of the jury (Pet. Appendix, Exhibit I B, page 32) and it should not be concluded therefrom that the jury had in fact given up hope of agreeing.

The jury in the instant case was discharged not because it was *unable to agree* but because it failed to reach a verdict by a time which was arbitrarily set in advance by the

Presiding Judge (Pet. Appendix, Exhibit I B, pages 30 and 31).

3. Finally, the Government apparently believes that the Petitioner waived his constitutional guaranty against double jeopardy in that he offered no objection to the improper and illegal manner in which the jury was discharged without a verdict (Gov. Br., page 5). The Government cited no authority for its position. While this Court has not ruled explicitly on this question, it has held that a strong presumption is raised against the waiver of fundamental constitutional rights by an accused. *Von Moltke* v. *Gillies*, 332 U. S. 708, 723 (1948); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Other courts, however, have held that the mere silence of an accused or his failure to object to a discharge of a jury cannot amount to a waiver of his immunity from being tried a second time. *Himmelfarb* v. *United States*, 175 F. 2d 924, 931, fn. 1 (9th Cir. 1949); *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606 (1935); and *People Ex Rel. Stabile* v. *Warden*, 124 N. Y. S. 341 (1910).

Respectfully submitted,

JOHN O'C. FITZ GERALD, *Pro Se*,
Petitioner,

CHARLES F. MARINO,
10 S. La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.